IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1145 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

ASLAMKHAN LALKHAN PATHAN

Appearance:

1. Criminal Appeal No. 1145 of 1999

MR IM PANDYA ADDL.PUBLIC PROSECUTOR for State

MRS SHILPA J UNWALLA for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 19/08/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

The present appeal has been filed by the State under sec.377 of the Code of Criminal Procedure, 1973 for the enhancement of the sentence awarded upon the respondent accused by the learned Special Judge, Junagadh in Special Case No.91 of 1997 vide judgement and order dtd.30/7/1999, convicting the respondent accused for the offence punishable under sec.20(B) of the Narcotic Drugs and Psychotropic Substances, Act, 1985 (hereinafter referred to as "the NDPS Act" for convenience) for four years rigorous imprisonment and fine of Rs.15,000/= and in default of making the payment, further rigorous imprisonment for a period of six months.

2. It is required to be made clear at this stage that the respondent accused has not challenged the impugned judgement and order of conviction awarded against him by filing appeal till today.

3. Short facts of the prosecution case are such that on 1/3/1997, Mr.VR Kandariya, was serving in serving in Junagadh Police Station as Police Sub-Inspector. At that time, at about 10.00 a.m., he received information through his informant that one Aslamkhan Lalkhan is keeping Cannabis in his house and is also selling the same. On receiving the said information, he made entry to that effect into the Station Diary (Ex.32) and also informed to his superior officer in writing (Ex.30) and after consultation with Mr.Vaja, Police Inspector of the said police station and Deputy Superintendent of Police, Mr.Patel called Panaches and prepared preliminary panchnama and went along with police personnel including the Dy.S.P. and PI in Government vehicle to the house of the accused situated in Ganesh Nagar area of Junagadh. When they reached there, the accused was present there. Thereafter, they informed regarding the same to the accused and also informed regarding his valuable right about his search and seizure and asked him before whom he wants to have search and seizure either before the executive magistrate or before the gazetted officer. The accused denied the same and shown willingness to do search and seizure in presence of two police panches. Therefore, they all entered into the house of the accused and started search. During the course of search, they found one bag and on opening the same, they found one bag made of cloths. On opening the same, there was plastic bag, therein there were leaves and branches and on verifying the same, they found that it is Cannabis. Therefore, they sent one police constable to call for weighing man to weigh the aforesaid substance. On arrival of weighman, the substance was weighed and found that it was 1850 Grams. Thereafter, two samples were

taken, and completed the necessary procedure for seal and seizure and also applied slip on the said samples duly signed by the panches. Thereafter, the PSI completed necessary formality and filed complaint against the accused and said complaint has been registered as CR No.II-119 of 1997 before the Junagadh City Police Station for the offences punishable under section 20(B) of NDPS Act.

4. On receiving the muddamal, accused, panchnama etc. by the concerned PSO, necessary entries were made in the concerned registers and the muddamal was registered in the muddamal register and the same was placed in the safe custody and also completed other required formalities, like giving copy of the arrest memo and ground of arrest, to the accused and also informed his superior officers and relatives of the accused. Thereafter, the accused was sent to judicial custody and muddamal was sent to Forensic Science Laboratory for analysis and further investigation was started. On receipt of the FSL Report and on completion of investigation, chargesheet was filed and the case was numbered as Sessions Case No.91 of 2997 in the Court of learned Special Judge, Junagadh. When the accused appeared before the trial court, charge was framed on 24/5/1999 at Ex.1 for the offences punishable under sec.20(B) of the NDPS Act. As the accused denied the guilt, to prove the guilt against the accused the prosecution has examined and relied upon the following witnesses, namely ;

Balkrushna Ravishankar Thakar, PW 1, Ex.No.9, Dayabhai Chhaganbhai, PW 2, Ex.14, Kalubhai Bhagvanjibhai, PW 3, Ex.16, Mohanlal Jerambhai, PW 4, EX.17, Arjanbhai Bhikhabhai, PW 6, EX.25, Bhavanbhai Tabhabhai Vanja, PW 7, EX.29 and Vajshi Ramshibhai Kandoriya, PW 8 EX.31.

5. The prosecution has mainly relied on the following documentary evidence, namely :-

Relevant entry of secret information in the Station Diary, Ex.32, copy of letter informing the Inspector General of police regarding secrete information, Ex.33, copy of the Saranjam form, Ex.30, Resolution of Sec.42 of the NDPS Act, Ex.35, Panchnama of the scene of offence and Seizure, Ex.10, Complaint, Ex.38, Form No.F for contraband article Ex.40, Muddamal Dispatch Note, Ex.19, Receipt for acceptance of muddamal, Ex.20, Report of the FSL Ex.22, Report of FSL, Ex.23, FIR, Ex.26, Note for relevant entry, Ex.27

and Slip pasted on the bag from which the contraband article was found, Ex.45.

6. On submission of the closing Purshise, further statement of the accused was recorded by the Special Judge, Junagadh under sec.313 of the Code of Criminal Procedure. Thereafter, the accused has chosen not to enter into the witness box to give oral evidence and not to examine any witness in his favour.

7. Having heard the learned counsel for the accused and learned Assistant Public Prosecutor, and considering the oral and documentary evidence on record, the Special Judge, Junagadh convicted the appellant as aforesaid.

8. It is required to be noted at this stage that this appeal has been preferred by the State under sec.377 for enhancement of the sentence awarded by the court below and no other ground has been urged except the seriousness of the offence, as the accused has not assailed the impugned judgement and order of conviction passed by the court below.

9. Heard Mr.IM Pandya, learned A.P.P. for State and Mrs.Shilpa J. Unwala for Respondent Accused at length.

10. At this stage it is required to be noted that the muddamal which has been alleged to have been recovered and seized is Cannabis (Ganja) and keeping in mind the above aspect of the matter, Mr.Pandya, learned APP has drawn our attention towards relevant sections of the NDPS Act and argued that it is serious offence and in such type of offence, court below ought not to have exercised its discretion and ought to have imposed maximum punishment. He also took us to Sec.20 of the NDPS Act, which reads as follows;-

"20. Punishment for contravention in relation to cannabis plant and cannabis. in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports, inter-State, exports inter-State or uses cannabis, shall be punishable-

(i) Where such contravention relates to ganja or cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees;

(ii) where such contravention relates to cannabis other than ganja, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees:

Provided that the Court may, for reasons to be recorded in the judgement impose a fine exceeding two lakhs rupees.

11. Learned APP has mainly argued that considering the seriousness of the offence, the sentence awarded by the trial court is lesser and hence, the sentence is required to be enhanced.

12. Whereas learned Advocate Ms.Unwana, drawing our attention to sec.20 of the NDPS Act more particularly Sec.20(B)(i), he has argued that considering the quantity seized from the respondent accused, the sentence awarded by the trial court cannot be enhanced and the present appeal is required to be dismissed.

13. Having heard Mr.Pandya, the Assistant Public Prosecutor for State, Ms.Unwala, learned counsel for respondent accused and considering the evidence on record, record of the trial court, more particularly the quantity of Cannabis seized from the respondent accused the case falls under sec.20(b)(i) of the NDPS Act, which provides for rigorous imprisonment for a term which MAY extend to FIVE years, and shall also be liable to fine which MAY extend to one FIFTY THOUSAND rupees. Thus, discretion has been granted in favour of the Court to impose maximum rigorous imprisonment for a period of five years and maximum fine upto Rs.50,000/-. The section does not provide for minimum punishment for 5 years and fine of Rs.50,000/-, as the word "may" is used by the legislature and not word "shall", otherwise, the trial court is duty bound to impose minimum punishment of 5

years and fine of Rs.50,000/-. In view of the above, considering the quantity of 1850 Grams seized from the respondent accused, the trial court has exercised its jurisdiction and awarded rigorous imprisonment up to 4 years, instead of maximum punishment for a period of 5 years and fine of Rs.15,000/- instead of maximum fine of Rs.50,000, and in default of making payment of fine, it is ordered to undergo further rigorous imprisonment for a period of six months.

14. In view of the above facts and circumstances of the case and evidence on record, we are of the opinion that by the impugned detailed and reasoned judgement and order of conviction more particularly keeping in mind the quantity of the contraband article seized from the respondent accused, the trial court has rightly awarded the sentence, after considering all the aspects of the matter, and while doing so, the trial court has not committed any error. There is no reason worth the name to interfere with the impugned reasoned and detailed judgement and order of conviction. Hence, in our opinion, this appeal preferred by the State for enhancement of the sentence cannot sustain.

15. In the result, the appeal is hereby dismissed.

(R.P.DHOLAKIA,J.)

(SHARAD D.DAVE,J.)

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